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Architects of Justice: The Prosecutor's Role and Resolving Whether Inadmissible Evidence Is Material Under the *Brady* Rule

Blaise Niosi
Fordham University School of Law

ARCHITECTS OF JUSTICE: THE PROSECUTOR'S ROLE AND RESOLVING WHETHER INADMISSIBLE EVIDENCE IS MATERIAL UNDER THE *BRADY* RULE

*Blaise Niosi**

Independence is my happiness, and I view things as they are,
without regard to place or person; my country is the world,
and my religion is to do good.[1]

In Brady v. Maryland, *the U.S. Supreme Court held that the prosecution has a constitutional duty to disclose evidence favorable to the defendant's guilt or punishment upon request. The Court's subsequent expansion of its holding in* Brady *has formed the "*Brady *rule," which requires the prosecution to learn of and to disclose to the defendant all material exculpatory and impeachment information. The Court defined "material" as information that would cause a reasonable probability of a different trial outcome had it been disclosed.*

Currently, a circuit court split exists regarding whether evidence is material for purposes of the Brady *rule if it is inadmissible at trial. This split of authority reflects longstanding tension underlying the* Brady *doctrine but was incited by the Court's ambiguous holding in* Wood v. Bartholomew. *The conflict has substantial repercussions in practice because the U.S. Department of Justice directs federal prosecutors to follow their offices' local disclosure precedent. Because disclosure precedent may vary by office, prosecutors' understanding of their constitutional disclosure duty may be inconsistent. This could lead to the alarming result of disparate defendant treatment based solely on the jurisdiction where the defendant is charged.*

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* J.D. Candidate, 2015, Fordham University School of Law; M.A., 2008, University of Manchester; B.A., 2006, Skidmore College. Thank you to Professor James L. Kainen for his insight and guidance, and to my friends and family for their support. I would especially like to thank the professors, attorneys, and prosecutors with whom I have had the privilege of working, and those whose work I simply admire from afar, for being a source of tremendous inspiration.

1. THOMAS PAINE, RIGHTS OF MAN, PT. 2 (1792), *reprinted in* 1 THE COMPLETE WRITINGS OF THOMAS PAINE 345, 414 (Philip S. Foner ed., 1969).

This Note examines the conflict and analyzes the prosecutor's role, concluding that the Supreme Court should resolve the conflict by ruling that inadmissible evidence may nonetheless be material if its disclosure would yield admissible evidence. This Note ultimately argues, however, that enduring Brady *disclosure reform must be affected from within the prosecutor's office.*

INTRODUCTION

In *Brady v. Maryland*,[2] the U.S. Supreme Court held that a criminal defendant's due process rights under the Fifth and Fourteenth Amendments are violated when the prosecution fails, irrespective of good or bad faith, to disclose upon request evidence favorable to the defendant's guilt or punishment.[3] The Court subsequently expanded this complicated holding[4] in a series of opinions that create the "*Brady* rule."[5] The *Brady* rule imposes an affirmative duty on the prosecution to review and to disclose without request any exculpatory or impeachment evidence known to the prosecution team and material to guilt or punishment.[6]

A "*Brady* violation" is a breach of the prosecutor's broad duty to disclose exculpatory material evidence.[7] This information is often referred to as "*Brady* material."[8] To claim a *Brady* violation, the defendant must demonstrate three factors: (1) that the prosecution willfully or inadvertently suppressed evidence; (2) which is favorable to the defendant as exculpatory or impeaching; and (3) is material to an issue at trial.[9] This Note focuses on an issue of the "materiality" factor.

Thirty-two years after *Brady*, the Court was confronted with a problem of materiality. In *Wood v. Bartholomew*,[10] the Court ruled on whether results of a polygraph test were material under *Brady* despite being inadmissible at

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2. 373 U.S. 83 (1963).

3. *See id.* at 87 ("[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

4. *See* United States v. Oxman, 740 F.2d 1298, 1308 (3d Cir. 1984) (characterizing Justice William O. Douglas's opinion for the Court as "unfortunately unanalytical").

5. *See infra* Part I.C.

6. *See* Johnson v. Folino, 705 F.3d 117, 128 (3d Cir. 2012), *cert. denied*, 134 S. Ct. 61 (2013) (citing Kyles v. Whitley, 514 U.S. 419, 437–38 (1995); United States v. Bagley, 473 U.S. 667, 676 (1985); United States v. Agurs, 427 U.S. 97, 107 (1976); *Brady*, 373 U.S. at 87). *But see* U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-5.001(B) (2010) [hereinafter U.S. ATTORNEYS' MANUAL], *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/index.html (noting that although the U.S. Attorney's Office (USAO) recognizes that "[g]overnment disclosure of material exculpatory and impeachment evidence is part of the constitutional guarantee to a fair trial. . . . Neither the Constitution nor this policy [of disclosure], however, creates a general discovery right for trial preparation").

7. *See* Strickler v. Greene, 527 U.S. 263, 281 (1999).

8. *See Failure to Disclose*, OPEN FILE, http://www.prosecutorialaccountability.com/defining-misconduct/failure-to-disclose/ (last visited Nov. 26, 2014).

9. *See Strickler*, 527 U.S. at 281–82; United States v. Silva, 71 F.3d 667, 670 (7th Cir. 1995); *see also* Randall D. Eliason, *The Prosecutor's Role: A Response to Professor Davis*, AM. U. CRIM. L. BRIEF 15, 19–20 (2006), *available at* http://www.wcl.american.edu/journal/clb/documents/CriminalLawBrief-VolIIIIssueI-Fall2006.pdf (discussing the "harmless error" doctrine as applied to *Brady* violations and noting that "most cases involving allegations of prosecutorial misconduct are upheld under the 'harmless error' doctrine" because the "events labeled 'prosecutorial misconduct' did not affect the fundamental fairness of the trial or call into question the result, and thus do not require a new trial").

10. 516 U.S. 1 (1995).

trial.[11] The Court held that the polygraph results were immaterial because they were inadmissible and rejected the defendant's argument that the results were material because they could have led to admissible evidence as too vague.[12]

The federal courts of appeals have subsequently interpreted the *Wood* opinion differently, resulting in a split of authority over whether evidence inadmissible at trial may nonetheless be material for *Brady* purposes.[13] The conflict is comprised of three primary interpretations of the *Brady* rule's materiality requirement. First, that inadmissible evidence is per se immaterial.[14] Second, that admissibility is a factor of materiality.[15] Lastly, that evidence is material if its disclosure would create a reasonable probability of a different outcome at trial.[16]

This conflict is a "matter of some confusion in federal courts"[17] with significant practical repercussions[18] warranting examination in this Note.[19] The U.S. Department of Justice (DOJ) directs its federal prosecutors to "evaluate their discovery obligations" by "consider[ing] circuit and district precedent."[20] Each U.S. Attorney's Office (USAO) is "direct[ed] to develop a discovery policy that reflects circuit and district court precedent

11. *See id.* at 6.
12. *See id.* at 8.
13. *See infra* Part II.
14. *See infra* Part II.A.
15. *See infra* Part II.B.
16. *See infra* Part II.C.
17. Felder v. Johnson, 180 F.3d 206, 212 (5th Cir. 1999).
18. *See* Jeffrey L. Bornstein, Leanne E. Hartmann & Laura A. Brevetti, *DOJ's New Guidance on Criminal Discovery Practices: How Much Has Changed?*, K&L GATES LLP GOV'T ENFORCEMENT ALERT 2 (Jan. 27, 2010), http://www.klgates.com/dojs-new-guidance-on-criminal-discovery-practices-how-much-has-changed-01-27-2010/ (noting that the Department of Justice directs each USAO to develop a discovery policy that reflects that office's circuit court's precedents and practices, which may perpetuate a system in which defendants are subject to disparate disclosure polices based solely on where they are charged); *see also* Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 35, 57 (1987) (asserting that 35 of 350 wrongful convictions resulted from prosecutorial suppression of evidence); James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973–1995*, 78 TEX. L. REV. 1839, 1850 (2000) (noting that prosecutorial suppression of evidence accounted for 16 to 19 percent of reversible errors). *But see* Eliason, *supra* note 9, at 19–20 (commenting that given the number of prosecutors in the country (over 35,000) and the number of criminal cases prosecuted each year (70,000 in federal courts) the incidences of prosecutorial misconduct are extremely small).
19. *See, e.g.*, Lara A. Bazelon, *Hard Lessons: The Role of Law Schools in Addressing Prosecutorial Misconduct*, 16 BERKELEY J. CRIM. L. 391, 396, 412 (2011) (discussing law schools' "unique opportunity to reach tomorrow's prosecutors and defense attorneys" by playing the "critical role" of addressing prosecutorial disclosure misconduct before it happens).
20. David W. Ogden, *Memorandum for Department Prosecutors: Guidance for Prosecutors Regarding Criminal Discovery* (Jan. 4, 2010), *available at* http://www.justice.gov/dag/memorandum-department-prosecutors.

and local rules and practices."[21] DOJ implemented this policy specifically because it found that discovery "practices varied greatly in each district, influenced in large part by differing judicial expectations."[22] Different federal appellate jurisdictions adhere to different definitions of *Brady* material based on the information's admissibility.[23] DOJ's policy not to pursue uniformity may therefore "unfortunately perpetuate a system of criminal justice where a defendant's right to defend himself will largely depend on the federal district that brings the charge."[24]

This Note addresses the current circuit split over whether inadmissible evidence may nonetheless be material under *Brady*. Part I examines the *Brady* rule and the role of the prosecutor, as well as the Supreme Court decision exacerbating the conflict. Part II then outlines this conflict, comprised of three interpretations of how admissibility informs materiality. In Part III, this Note concludes that the Supreme Court should resolve the split by ruling that admissibility is a factor of materiality, but this Note ultimately argues that disclosure reform must come from within the prosecutor's office.

I. THE *BRADY* DOCTRINE AND THE ROLE OF THE PROSECUTOR

This Note seeks to resolve a current split of authority over whether evidence inadmissible at trial can nonetheless be material for *Brady* rule purposes.[25] The conflict lies at the intersection of trial practice and the constitutionally rooted *Brady* doctrine. Outlining both the *Brady* doctrine and the prosecutor's role is necessary to understand how best to address the conflict.[26] Part I.A of this Note discusses the *Brady* rule by outlining the Supreme Court's holding in *Brady v. Maryland*, as well as its predecessor and progeny jurisprudence. Part I.B then addresses the prosecutor's role by identifying the prosecution team, outlining the prosecutor's responsibilities, and exploring the non-doctrinal sources governing the duty to disclose. Part I.C then concludes by introducing *Wood v. Bartholomew*, the Supreme Court holding exacerbating the circuit split on when inadmissible evidence is nonetheless material for *Brady* purposes.

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21. David W. Ogden, *Memorandum for Heads of Department Litigating Components Handling Criminal Matters: Requirement for Office Discovery Policies in Criminal Matters* (Jan. 4, 2010), *available at* http://www.justice.gov/dag/memorandum-heads-department-litigating-components-handling-criminal-matters-all-united-states.

22. Bornstein et al., *supra* note 18, at 3.

23. *See infra* Part II.

24. Bornstein et al., *supra* note 18, at 1.

25. This Note subsequently refers to "*Brady* rule purposes" as simply "*Brady* purposes."

26. *See* Ellen Yaroshefsky, *Prosecutorial Disclosure Obligations*, 62 HASTINGS L.J. 1321, 1321 (2011) (noting that "[p]rosecutorial disclosure of information to the defense has long been recognized as essential to a fair criminal justice system and yet, the required disclosure is ill defined and the subject of ongoing contention").

A. The Brady *Rule*

The *Brady* rule states that a criminal prosecutor has a duty to uphold the defendant's due process rights by disclosing any evidence material to guilt or punishment, or that could be used for impeachment.[27] This doctrine was first articulated by the Supreme Court in *Brady v. Maryland*, but it is rooted in predecessor cases and refined in progeny opinions.[28] This section tracks the development of the *Brady* rule. Part I.A.1 outlines the cases leading up to *Brady v. Maryland*. Part I.A.2 discusses the *Brady* holding itself. Part I.A.3 addresses the cases refining *Brady* and defining "materiality."

1. Laying the Foundation: The Predecessor Cases

Until its holding in *Brady v. Maryland*, the Supreme Court had never explicitly found that the prosecution's failure to disclose exculpatory evidence to a criminal defendant could be grounds for a new trial.[29]

The Court first addressed the parameters of prosecutorial disclosure in *Mooney v. Holohan*.[30] There, the petitioner contended that the prosecution violated his due process rights by obtaining a conviction after deliberately using perjured testimony and suppressing evidence impeaching that testimony.[31] The Court rejected the Attorney General's argument that due process rights are violated only when the suppression deprives him of notice and hearing, or prevents him from presenting his own evidence.[32] Importantly, this case marked the beginning of the Court's effort to define the outer boundaries of the prosecutor's duty, signaling that it construes the duty to actively "safeguard[] the liberty of the citizen against deprivation through the action of the State," rather than requiring mere notice and hearing.[33] The Court further avoided defining the prosecutor's duty by stating that it was "unable to approve [the Attorney General's] narrow view of the requirement of due process."[34] However, the Court nonetheless laid the groundwork for a broader construction of the prosecutor's role as due process protector.

Eight years later, the Court began to fill in the broad parameters of prosecutorial duty that it had sketched out in *Mooney*.[35] In *Pyle v.*

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27. *See* Kyles v. Whitley, 514 U.S. 419, 437–38 (1995); United States v. Bagley, 473 U.S. 667, 676 (1985); United States v. Agurs, 427 U.S. 97, 107 (1976); Brady v. Maryland, 373 U.S. 83, 87 (1963).

28. *See infra* Part I.A.1, 3.

29. *See* John G. Douglass, *Fatal Attraction? The Uneasy Courtship of* Brady *and Plea Bargaining*, 50 EMORY L.J. 437, 469 (2001).

30. 294 U.S. 103 (1935).

31. *See id.* at 110.

32. *See id.* at 112.

33. *Id.*

34. *Id.*

35. *See* Brady v. Maryland, 373 U.S. 83, 86 (1963) (noting that "[i]n *Pyle v. Kansas* . . . we phrased the rule [of *Mooney v. Holohan*] in broader terms").

Kansas,[36] the petitioner was sentenced to life imprisonment plus ten to twenty-one years for murder and robbery.[37] The Court held that his due process rights were violated because the prosecutor knowingly relied on perjured testimony and deliberately suppressed other favorable testimony.[38] In finding that these acts would constitute "a deprivation of rights guaranteed by the Federal Constitution,"[39] *Pyle* marked a shift in the Court's interpretation of the prosecutor's duty from defining what the limits were *not* to what they affirmatively include.

In *Napue v. Illinois*,[40] the Court further developed its prosecutorial disclosure doctrine by applying the *Mooney* standard to overturn a murder conviction.[41] In *Napue*, the petitioner was sentenced to 199 years in prison for fatally shooting an off-duty policeman in a bar.[42] At trial, the prosecution relied heavily on the testimony of a man who was part of the shooting and had himself been convicted for the officer's murder and sentenced to 199 years in prison.[43] Although the prosecutor had promised the witness a sentencing reduction recommendation in exchange for his testimony against the petitioner, the witness testified at trial that he had not received any consideration in exchange for his testimony.[44]

The petitioner argued that the prosecution violated his due process rights when it failed to correct this false testimony.[45] The Court agreed, holding that the prosecutor's failure to correct the false testimony constituted a due process violation because it may have altered the trial's outcome.[46] The Court's holding in *Napue* maintained its concern with intentional prosecutorial misconduct in *Mooney* and further expanded the prosecutor's responsibility to not merely refrain from knowingly using false testimony but rather to proactively correct false testimony when necessary.[47]

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36. 317 U.S. 213 (1942).
37. *See id.* at 214.
38. *See id.*
39. *Id.* at 216.
40. 360 U.S. 264 (1959).
41. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) (noting that "[i]n *Napue v. Illinois*, we extended the test formulated in *Mooney v. Holohan*" (citation omitted)).
42. *See Napue*, 360 U.S. at 265.
43. *See id.* at 265–66.
44. *See id.* at 265.
45. *See id.*
46. *See id.* at 272.
47. *See id.* at 269. The Court asserted:

> First, it is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment . . . . The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.

Id. (citing Alcorta v. Texas, 355 U.S. 28, 78 (1957) (emphasis omitted). Although the Court's criminal prosecutorial disclosure doctrine remained focused on curtailing intentional misconduct, it expanded with *Brady* to put "such subtle factors as the possible interest of the witness in testifying falsely" within the prosecutor's purview to actively remedy it if required. *Id.*

2. *Brady v. Maryland*

In *Brady v. Maryland*, the U.S. Supreme Court articulated the prosecutor's duty to disclose, which would subsequently be developed into the *Brady* rule.[48] The *Brady* holding can be seen as a natural extension of the Court's prior rulings on a criminal defendant's rights.[49] Alternatively, it can be understood as a significant departure. Whereas the Court's pre-*Brady* focus was on intentional prosecutorial misconduct, *Brady* created a prophylactic protection of the defendant's due process rights.[50]

In *Brady*, the Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment."[51] This holding reflects a shift away from the narrow focus of the prosecutor's conduct, as emphasized in the *Mooney* line of cases, to the *defendant's* rights.[52]

At twenty-five years old, John Brady was unemployed and expecting a baby with his still-married girlfriend.[53] Concerned with providing for his burgeoning family, Brady planned to rob a bank with his girlfriend's brother, Donald Boblit.[54] Needing a car, Brady and Boblit agreed to steal an acquaintance's new Ford.[55] The two men waited together near the acquaintance's driveway, tricked him into exiting his car, struck him unconscious with a blow to the head, and took him to a secluded field where they strangled him to death and carried the corpse into the woods.[56]

Afterwards, Brady made a series of inconsistent statements to the police.[57] He admitted to almost every aspect of those statements at trial but

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48. *See supra* note 27 and accompanying text.

49. *See, e.g.*, Brady v. Maryland, 373 U.S. 83, 86 (1963) ("This ruling is an extension of *Mooney v. Holohan* . . . ."); Adam M. Harris, Note, *Two Constitutional Wrongs Do Not Make a Right: Double Jeopardy and Prosecutorial Misconduct Under the* Brady *Doctrine*, 28 CARDOZO L. REV. 931, 934 (2006) (asserting that the *Brady* holding "was an extension of an earlier Supreme Court case").

50. *See* Bennett L. Gershman, *Reflections on* Brady v. Maryland, 47 S. TEX. L. REV. 685, 686 (2006) (noting that "by explicitly commanding prosecutors to disclose to defendants facing a criminal trial any favorable evidence that is material to their guilt or punishment, *Brady* launched the modern development of constitutional disclosure requirements"); Michael Serota, *Stare Decisis and the* Brady *Doctrine*, 5 HARV. L. & POL'Y REV. 415, 416 (2011) (noting that "the Court's post-*Brady* jurisprudence expanded the *Brady* doctrine beyond its original holding by applying it to new contexts and different types of evidence").

51. *Brady*, 373 U.S. at 87.

52. *See, e.g.*, Stephanos Bibas, Brady v. Maryland*: From Adversarial Gamesmanship Toward the Search for Innocence?*, *in* CRIMINAL PROCEDURE STORIES 129 (Carol S. Steiker ed., 2006) ("*Brady*'s test turns not on whether the prosecutor misled a jury or acted in good faith, but on whether the evidence is favorable and material to guilt or punishment. Thus, *Brady* marked a potentially revolutionary shift from traditionally unfettered adversarial combat toward a more inquisitorial, innocence-focused system.").

53. *See id.* at 132.

54. *See id.* at 132–33.

55. *See id.* at 133.

56. *See id.*

57. *See id.*

denied that he was the actual killer.[58] Boblit admitted to taking part in the robbery and killing in a series of statements to the police.[59] In his fifth statement, however, Boblit admitted that it was he, not Brady, who had actually struck the man unconscious and strangled him to death.[60]

Both Brady and Boblit were charged with murder.[61] Before trial, Brady's attorney requested that the prosecution share any of Brady or Boblit's extrajudicial statements.[62] The prosecution shared several of Boblit's statements but withheld the fifth statement in which he admitted to having been the killer.[63] Brady would not learn of this exculpatory statement until after he was convicted of first-degree murder and sentenced to death.[64]

The Supreme Court affirmed the Maryland Court of Appeals finding that suppression of Boblit's confession constituted a violation of Brady's due process rights.[65] Extending and expanding the rule as crafted in *Mooney*, *Pyle*, and *Napue*,[66] the Court held that the prosecution's suppression of evidence favorable to the defendant and material to his guilt or punishment—notwithstanding good intentions—violated the defendant's due process rights.[67] Emphasizing that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair," the Court noted that the prosecutor's duty is to "comport with standards of justice" rather than simply to secure a conviction.[68] The Court reasoned that any evidence that would "tend to exculpate" the defendant shapes the outcome of a trial, and is thus a factor of attaining such standards of justice.[69]

3. Post-*Brady* Jurisprudence and Defining "Material"

Brady v. Maryland is a landmark holding in part because it departed from predecessor doctrine to expand the prosecutor's duty of disclosure.[70] Writing for the majority, Justice William O. Douglas did not, however,

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58. *See* Brady v. State, 160 A.2d 912, 913 (Md. 1960), *rev'd and remanded*, 174 A.2d 167 (Md. 1961), *aff'd*, 373 U.S. 83 (1963).

59. *See* Bibas, *supra* note 52, at 133.

60. *See* RICHARD HAMMER, BETWEEN LIFE AND DEATH: A SHATTERING ACCOUNT OF A MAN'S NINE YEARS IN THE HORRIFYING LIMBO OF DEATH ROW 114–15 (1969).

61. *See* Brady v. State, 154 A.2d 434 (Md. 1959).

62. *See Brady*, 373 U.S. at 84.

63. *See id.*

64. *See id.*; *see also* Bibas, *supra* note 52, at 134 (noting that Brady's appellate attorney discovered Boblit's confession statement by reviewing the trial transcripts).

65. *See Brady*, 373 U.S. at 86.

66. *See supra* Part I.A.1.

67. *See Brady*, 373 U.S. at 86–88.

68. *Id.* at 87–88. See also *infra* Part I.B for further discussion of the prosecutor's role.

69. *Brady*, 373 U.S. at 88.

70. *See* Gershman, *supra* note 50, at 686 n.7 (noting that "*Brady* built its holding principally on several earlier Supreme Court and circuit court decisions dealing with the prosecutor's use of perjured testimony, and in a few cases with the prosecutor's suppression of exculpatory evidence").

define the terms on which the *Brady* rule, as articulated, would turn.[71] A line of Supreme Court cases from 1972 to 1995 refines pivotal aspects of the *Brady* holding.[72] Most significant to this Note's analysis is the Court's definition of "material" evidence.[73]

In *Giglio v. United States*[74] the Court established that evidence that could be used to impeach a witness was "material" for *Brady* rule purposes.[75] There, the Court found that suppressing evidence that could undercut a witness's credibility is a due process violation where the defendant's guilt or innocence may rest on that witness's reliability.[76] The Court thus established two types of evidence that may be "material" and so subject to disclosure: exculpatory evidence and impeachment evidence.[77]

In 1976 the Court began to define the contours of "materiality." In *United States v. Agurs*[78] the Court defined material evidence in three ways. First, evidence can be material even if the defendant does not request its disclosure and rather should be proactively shared by the prosecution regardless of any request from the defendant.[79] Second, evidence is material for *Brady* purposes if it creates a reasonable doubt that did not otherwise exist.[80] The Court would continue to explain this in future cases.[81] Lastly, the Court found that materiality turns on the defendant's

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71. *See infra* Part II.

72. *See* Gershman, *supra* note 50, at 689–90. Gershman notes that "the [*Brady*] 'rule' has undergone considerable judicial alteration over the years," but the

> most far-reaching modification of *Brady* has been the judiciary's interpretation of the concept of "materiality" . . . . Whereas *Brady* used the term "materiality" prospectively to identify evidence that a prosecutor is required to disclose to a defendant to protect his right to a fair trial, the judiciary's current approach defines materiality retrospectively to identify evidence that a prosecutor should have disclosed to the defendant, and whether the prosecutor's nondisclosure was so prejudicial that it denied the defendant a fair trial.

Id.

73. *See infra* Part II. Although the Court's holding in *Brady v. Maryland* defined the duty to disclose with several factors (i.e., "suppression," "favorable to an accused," "material either to guilt or to punishment," and "irrespective of the good or bad faith"), this Note focuses on the "materiality" factor alone. *See* 373 U.S. 83, 87 (1963). The various interpretations of "material" have garnered significant interest from courts and commentators. *See* Gershman, *supra* note 50, at 689 (noting that "courts and commentators consistently have recognized, the most far-reaching modification of *Brady* has been the judiciary's interpretation of the concept of 'materiality'").

74. 405 U.S. 150 (1972).

75. *See id.* at 154–55.

76. *See id.* at 154. Although the Court broadly held that evidence that may be used to impeach a witness must be disclosed, some nonetheless interpret *Giglio* narrowly to limit the prosecutor's disclosure obligation to only agreements made with key witnesses. *See* Peter A. Joy & Kevin C. McMunigal, *Implicit Plea Agreements and Brady Disclosure*, 22 CRIM. JUST. 50, 50 (2007).

77. *See* Douglass, *supra* note 29, at 496.

78. 427 U.S. 97 (1976).

79. *See id.* at 110.

80. *See id.* at 112–13.

81. *See* United States v. Bagley, 473 U.S. 667 (1985).

ability to prepare for trial[82] due to an "overriding concern with the justice of the finding of guilt."[83]

The Court in *Agurs* further articulated the situations in which nondisclosure of information may be a due process violation requiring a reversal.[84] The first is when the prosecution knowingly uses false or perjured testimony that has a reasonable likelihood of affecting the jury's judgment.[85] Reversal may also be warranted when the prosecution does not share information the defendant specifically requested, and its disclosure may have affected the trial outcome.[86] Similarly, the prosecution is required to volunteer potentially exculpatory information and must share it after the defense's general request, or reversal may be warranted where its suppression creates a reasonable doubt of the defendant's guilt.[87]

Fifteen years later in *United States v. Bagley*,[88] the Court further fleshed out a materiality standard by holding that evidence is material for Brady purposes if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[89] Invoking its own definition of "reasonable probability" in *Strickland v. Washington*,[90] which addressed defense counsel's conduct rather than prosecution practices, the Court in *Bagley* defined reasonable probability as one "sufficient to undermine confidence in the outcome [of the trial]."[91]

The Court went on to further refine the "reasonable probability" standard in *Kyles v. Whitley*.[92] There, the Court specified that, although evidence is "material" for *Brady* purposes, if there is a reasonable probability that its disclosure would have altered the trial outcome, such an alternative outcome need not be an acquittal.[93] The Court explained that "[a]lthough the constitutional duty is triggered by the potential impact of favorable but undisclosed evidence, a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal."[94] The Court further clarified that the materiality standard is not a "sufficiency

82. *See Agurs*, 427 U.S. at 112 n.20.
83. *Id.* at 112.
84. *See id.* at 103–04.
85. *See id.* at 103.
86. *See id.* at 104.
87. *See id.* at 112–13.
88. 473 U.S. 667 (1985).
89. *Id.* at 682.
90. 466 U.S. 668, 694 (1984).
91. *Bagley*, 473 U.S. at 682; *see also* Serota, *supra* note 50, at 416 (interpreting the Court's "reasonable probability" standard to "constru[e] the doctrine's materiality requirement quite narrowly").
92. 514 U.S. 419 (1995).
93. *See id.* at 434.
94. *Id.*

of evidence test"[95] because the defendant demonstrates a *Brady* violation by showing that the favorable evidence, not on its own but in the context of the entire case, could "put the whole case in such a different light as to undermine confidence in the verdict."[96]

B. Prosecution in Practice

Understanding the role of the prosecutor is critical to this Note's analysis of the prosecutor's potential duty to disclose inadmissible material evidence. The prosecutor's role is complex as both an investigator and advocate[97] and is informed by a similarly complex group of authoritative sources.[98] This section first identifies "the prosecution," then discusses the prosecutor's unique adversarial role, and concludes by outlining the practical rules and standards that converge to guide the prosecutor's duty to disclose.

1. Identifying the Prosecution: Who Is the "Prosecution Team"?

A prosecutor is the legal officer representing the state or federal government in critical proceedings.[99] The definition of the prosecution as it relates to the duty to disclose *Brady* material, however, has effectively expanded beyond the individual attorney representing the government.[100] The Supreme Court has held that "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."[101] Therefore, if "the prosecution" is defined by its access to *Brady* material and its responsibility to the defendant, then it includes not just the government attorney but also law enforcement acting on the case.[102] The convergence of the prosecutor

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95. *Id.*

96. *Id.* at 434–35.

97. *See, e.g.*, Rory K. Little, *The ABA's Project to Revise the Criminal Justice Standards for the Prosecution and Defense Functions*, 62 HASTINGS L.J. 1111, 1119–20 (2011) (noting that the proposed revisions to the ABA's Prosecutorial Function Standards will define "who a 'prosecutor' is, add[] the concept of 'problem solver' to that definition, discuss[] who the prosecutor's 'client' is, . . . [and address] [t]he concept of attorneys acting within an organizational structure . . . most significantly within the organization of a prosecutor's office").

98. *See, e.g.*, ABA, STANDARDS FOR CRIMINAL JUSTICE: PROSECUTORIAL INVESTIGATIONS, pmbl. (Feb. 2008), *available at* http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pinvestigate.html (noting that "[a] prosecutor's investigative role, responsibilities and potential liability are different from the prosecutor's role and responsibilities as a courtroom advocate.").

99. BLACK'S LAW DICTIONARY 1416 (10th ed. 2014).

100. *See* Kyles v. Whitley, 514 U.S. 419, 437 (1995).

101. *Id.*

102. *See.e.g.*, Mark D. Villaverde, Note, *Structuring the Prosecutor's Duty to Search the Intelligence Community for* Brady *Material*, 88 CORNELL L. REV. 1471, 1480–92 (2003) (outlining the Court's jurisprudence on the prosecutor's duty to search government agencies for *Brady* material).

and law enforcement agents to create "the prosecution team" has roots in England[103] and continues today.[104]

DOJ itself acknowledges that the prosecutor is but one member of a larger "prosecution team."[105] Identifying who is a member of the prosecution team is crucial to *Brady* disclosure practices because government attorneys must review and disclose to the defense any favorable material held by any member of the prosecution team.[106] Determining which agencies and individuals are on the prosecution team can, however, require clarification.[107]

The prosecution team can be comprised of "federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant."[108] Moreover, the definition of the prosecution team can be "adjusted to fit the circumstances" of multidistrict investigations or parallel criminal and civil proceedings involving various federal agencies.[109] When the investigation involves a state law enforcement agency, DOJ advises its prosecutors to "make sure they understand the law in their circuit and their offices' practice regarding discovery."[110] Because identifying members of the prosecution team can be inexact, DOJ encourages its attorneys to "err on the side of inclusiveness."[111]

The prosecutor herself remains, nonetheless, distinct from the prosecution team in a way significant to this Note's analysis of the nexus of admissibility and materiality. It is the prosecutor's responsibility to "learn of" exculpatory or impeachment information held by other members of the prosecution team.[112] This passive language ("learn of") adopted by the Court is augmented by the active language of the U.S. Attorneys' Manual, stating that the prosecutor is obligated to "*seek* all exculpatory and

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103. *See* Bibas, *supra* note 52, at 131 (drawing from JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL (2003) to discuss the foundations of our American adversarial criminal system, the author states: "By the late eighteenth century [in England], lawyers had taken over the criminal process. . . . Prosecutors came to see police officers almost as their clients and worked closely with them to dig up evidence and witnesses and prepare witnesses' testimony for trial. . . . The American colonies inherited this adversarial criminal process from England").

104. *See generally* Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749 (2003).

105. *See, e.g.*, U.S. ATTORNEYS' MANUAL, *supra* note 6, § 9-5.001(B)(2).

106. *See* Kyles v. Whitley, 514 U.S. 419, 438 (1995).

107. *See, e.g.*, PUB. DEFENDER SERVICE FOR D.C., *BRADY V. MARYLAND* OUTLINE 21–22 (Jan. 2012), *available at* http://www.pdsdc.org/Resources/SLD/BradyOutline FINAL2012.pdf (clarifying to public defenders that the prosecution's responsibilities as they relate to *Brady* extend to an "entire 'Prosecution Team'").

108. Ogden, *supra* note 20.

109. *Id.*

110. *Id.*

111. *Id.*

112. Kyles v. Whitley, 514 U.S. 419, 437 (1995) (holding that the prosecution has a duty to disclose any evidence favorable to the defendant "known to the others acting on the government's behalf . . . including the police").

impeachment information from all the members of the prosecution team."[113] The prosecutor is thus charged with making herself aware of potentially exculpatory information that other members of the prosecution team may possess.

The prosecutor is responsible for disclosing exculpatory information to the defense even when the law enforcement investigators do not make her aware of its existence.[114] This responsibility is imputed on the prosecutor because she alone is responsible for reviewing evidence for materiality.[115] As the "architect of a proceeding,"[116] the prosecutor has the power to establish case management procedures that promote communication between the law enforcement investigators and government lawyers.[117]

2. The Prosecution's Role: Safeguarding Justice While Securing Convictions

This section identifies what the prosecution is expected to accomplish in a criminal proceeding. There is an inherent tension in the prosecutor's role as both an adversarial advocate and protector of the defendant's due process rights.[118] Indeed, DOJ is mindful to define a prosecutor's success in terms of justice and not convictions alone.[119] The prosecutor is charged with pursuing both a conviction and justice, but never the former at the expense of the latter.[120] The tension between attaining convictions while pursuing

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113. U.S. ATTORNEYS' MANUAL, *supra* note 6, § 9-5.001(B)(2) (emphasis added).

114. *See Kyles*, 514 U.S. at 420.

115. *See id.* at 437 ("[T]he prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' [of undermining confidence in the verdict] is reached."); *see also supra* Part I.A.

116. Brady v. Maryland, 373 U.S. 83, 88 (1963).

117. *See* Giglio v. United States, 405 U.S. 150, 154 (1972) ("[P]rocedures and regulations can be established to carry [the prosecutor's] burden and to insure communication of all relevant information on each case to every lawyer who deals with it.").

118. *See* Am. Coll. of Trial Lawyers, *Proposed Codification of Disclosure of Favorable Information Under Federal Rules of Criminal Procedure 11 and 16*, 41 AM. CRIM. L. REV. 93, 100 (2004) ("Woven throughout each of the major Supreme Court decisions construing *Brady* has been the theme that responsibility for ensuring the accused receives a fair trial rests not with the judge, jury, defense counsel, police, or some combination thereof, but with the prosecutor."); *see also Brady*, 373 U.S. at 87 (noting that justice is not achieved merely when criminals are convicted; rather, "our system of the administration of justice suffers when any accused is treated unfairly").

119. *See Mission Statement*, DOJ, http://www.justice.gov/about/about.html (last visited Nov. 26, 2014) ("To enforce the law and defend the interests of the United States according to the law . . . to seek just punishment for those guilty of unlawful behavior; and to ensure fair and impartial administration of justice for all Americans.").

120. *Id.* Although DOJ emphasizes the pursuit of justice over mere convictions, prosecutors may feel pressured to maintain a conviction success rate to retain respect and to advance in their profession. *Compare* Ogden, *supra* note 20 (advising prosecutors on discovery guidelines to "avoid lapses that can result in consequences adverse to the Department's pursuit of justice"), *with* Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 108 (1991) ("Prosecutors who restrain themselves may convict at a lower rate and thus appear

justice is inherent in the prosecutor's role[121] and reflected in *Brady v. Maryland* itself[122] where Justice William O. Douglas emphasized the prosecutor's dual responsibility as a public servant to promote the rule of law and to seek justice simultaneously.[123]

3. Disclosure in Practice: The Several Sources

The prosecutor's duty of disclosure is the product of a constitutional minimum standard set by *Brady* and its progeny[124] and augmented[125] by nonjudicial sources.[126] These sources include the American Bar Association's (ABA) Model Rules of Professional Conduct as well as its Criminal Justice Standards, the Federal Rules of Criminal Procedure, and the U.S. Attorneys' Manual.[127] This section examines how these sources overlap to define the prosecutor's disclosure duty in practice.

The prosecutor's disclosure duty is rooted in the *Brady* rule but is also informed by the ABA Model Rules of Professional Conduct.[128] The ABA is a voluntary association of attorneys that aims to improve the profession by, among other things, eliminating bias.[129] The ABA drafts the Model Rules of Professional Conduct as "rules of reason"[130] because the "legal profession is largely self-governing [and] is unique in this respect because

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less competent to their superiors."), *and* Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 900 (1995) (noting the role that a favorable trial record and securing convictions play in earning the respect and admiration of others in one's office).

121. *See* Berger v. United States, 295 U.S. 78, 88 (1935) (noting that the prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done").

122. *See* Brady v. Maryland, 373 U.S. 83, 88 (1963) (emphasizing that the prosecutor should not be the "architect of a proceeding that does not comport with standards of justice").

123. *See id.* at 87 n.2 ("We are constantly reminded of the now classic words penned by one of my illustrious predecessors, Frederick William Lehmann, that the Government wins its point when justice is done in its courts."); *see also* Little, *supra* note 97, at 1118 (noting that the ABA Ethics Committee proposed that the Fourth Edition of the Criminal Justice Standards include a standard titled "The Client of the Prosecutor").

124. *See supra* Part I.A.

125. *See* Cone v. Bell, 556 U.S. 449, 470 n.15 (2009) (noting that the disclosure duty "may arise more broadly under a prosecutor's ethical or statutory obligations" than under the Fourteenth Amendment as interpreted by *Brady*); Curry v. United States, 658 A.2d 193, 197 (D.C. 1995) (noting that the Court's holding in *Brady* "is not a discovery rule but a rule of fairness and minimum prosecutorial obligation" (quoting United States v. Beasley, 576 F.2d 626, 630 (5th Cir. 1978), *cert. denied*, 440 U.S. 947 (1979))).

126. *See* Yaroshefsky, *supra* note 26 at 1326–27.

127. *See id.* at 1326.

128. *See* Gershman, *supra* note 50, at 687 (noting that "more explicitly than any other constitutional procedural guarantee, *Brady*'s due process standard has been incorporated into an explicit ethical duty upon government attorneys").

129. *See About the American Bar Association*, ABA, http://www.americanbar.org/about_the_aba.html (last visited Nov. 26, 2014).

130. MODEL RULES OF PROF'L CONDUCT: SCOPE (1983).

of the close relationship between the profession and the processes of government and law enforcement."[131] Violation of the Model Rules does not itself give rise to a cause of action against the attorney but is the basis for invoking the professional disciplinary process.[132] Every state except California has adopted a Code of Professional Conduct modeled on the Model Rules of Professional Conduct.[133] Federal prosecutors are bound to their respective state code of conduct by virtue of 28 C.F.R. § 77.3.[134]

Model Rule of Professional Conduct 3.8(d) ("Special Responsibilities of a Prosecutor") is particularly relevant to this Note's discussion of whether the duty to disclose extends to inadmissible evidence. Model Rule 3.8(d) requires the prosecutor in a criminal case to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense," in addition to any mitigating information relevant to the sentencing phase of trial.[135]

The ABA's Ethics Committee interprets Model Rule 3.8(d) to be more expansive in scope than constitutionally mandated disclosure obligations.[136] Most significant to this Note's discussion of the relationship between

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131. MODEL RULES OF PROF'L CONDUCT: PREAMBLE: A LAWYER'S RESPONSIBILITIES.

132. *See id.* *See generally* Joel B. Rudin, *The Supreme Court Assumes Errant Prosecutors Will Be Disciplined by Their Offices or the Bar: Three Case Studies that Prove that Assumption Wrong*, 80 FORDHAM L. REV. 537 (2011).

133. *See State Adoption of the ABA Model Rules of Professional Conduct*, ABA, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (last visited Nov. 26, 2014).

134. 28 C.F.R. § 77.3 (2014) ("[A]ttorneys for the government shall conform their conduct and activities to the state rules and laws, and federal local courts rules, governing attorneys in each State where such attorney engages in that attorney's duties.").

135. MODEL RULES OF PROF'L CONDUCT R. 3.8(d).

136. *See* Bruce Green, *Report to the House of Delegates*, 2011 A.B.A. SEC. CRIM. JUST. REP. 9, *available at* http://www.americanbar.org/content/dam/aba/administrative/criminal_justice/2011a_resolution_105d.authcheckdam.pdf ("Rule 3.8(d) demands more than the constitutional case law . . . ."). A prosecutor could, therefore, satisfy her disclosure obligation legally while failing to satisfy it ethically. "The standard established by Rule 3.8(d) is 'only' an ethical requirement, not a rule that trial judges enforce." *Id.* at 10. The Model Rules therefore perhaps lack the teeth needed to accomplish its intended "narrow disciplinary" purpose of deterring prosecutorial misconduct by imposing a disclosure requirement that is more broad than the constitutional requirement. *Id*. *See generally* Gershman, *supra* note 50, at 691 (noting that "apart from legal accountability, prosecutors are almost never disciplined by the legal profession for *Brady* violations, even in the most blatant and easily provable cases"); Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV. 693 (1987); Editorial, *Rampant Prosecutorial Misconduct*, N.Y. TIMES, Jan. 5, 2014, at SR10 ("According to the Center for Prosecutor Integrity, multiple studies over the past 50 years show that courts punished prosecutorial misconduct in less than 2 percent of cases where it occurred. And that rarely amounted to more than a slap on the wrist, such as making the prosecutor pay for the cost of the disciplinary hearing."). *But see* Little, *supra* note 97, at 1113 (noting that "[w]hile the [Criminal Justice] Standards [discussed *infra*] have no force of law unless adopted by a court or legislature, their process of development has successfully yielded standards that fairly reflect widely shared professional views").

admissibility and materiality is the ABA's finding that evidence favorable to the defense should be disclosed regardless of its materiality.[137] Rule 3.8(d) requires the disclosure of evidence favorable to the accused regardless of its anticipated impact on the trial outcome.[138] The prosecutor's ethical duty to disclose is therefore not limited to admissible evidence and instead extends to any favorable information.[139]

The ABA sets out further disclosure duty guidelines[140] in the Standards for Criminal Justice: Prosecution and Defense Function.[141] Standard 3-3.11 ("Disclosure of Evidence by the Prosecutor") suggests that[142] the prosecutor not "intentionally fail" to disclose to the defense at the earliest opportunity any *Brady* material, and not to "intentionally avoid pursuit" of evidence because she believes it will damage her case.[143] Proposed revisions to the Prosecution Function Standards[144] include ten new standards addressing issues such as a "heightened duty of candor" and the "preservation of evidence."[145] The proposed fourth edition of the Standards reflects an understanding that the prosecutor's function and duty of disclosure are sufficiently complex to warrant "greater specificity."[146]

In addition to the professional guidelines drafted by the ABA, the prosecutor's duty to disclose exculpatory material evidence is informed by the Federal Rules of Criminal Procedure.[147] The Federal Rules of Criminal

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137. *See* Green, *supra* note 136, at 9–10.

138. *See id.* at 9.

139. *See id.* at 9–10.

140. *See* ABA, CRIMINAL JUSTICE STANDARDS: PROSECUTION FUNCTION § 3–1.1 (1993) [hereinafter CRIMINAL JUSTICE STANDARDS] (noting that the Criminal Justice Standards are "intended to be used as a guide to professional conduct and performance"); *see also* Little, *supra* note 97, at 1117 (noting that "the ABA does not intend or envision its Standards to be used as 'clubs' to batter lawyers who, for various and often reasonable reasons, may act differently than a Standard may propose").

141. *See generally* Little, *supra* note 97 (outlining the development of the Standards and the process adopted by the task force charged with spearheading revisions).

142. *See id.* at 1117 (noting that "the Standards never use the word 'must' but instead consistently state that lawyers 'should' do x or y").

143. CRIMINAL JUSTICE STANDARDS, *supra* note 140, § 3–3.11 ("(a) A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused. (b) A prosecutor should not fail to make a reasonably diligent effort to comply with a legally proper discovery request. (c) A prosecutor should not intentionally avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused.").

144. *See* Little, *supra* note 97, at 1114–15 (noting that the Standards Committee task force began the Prosecution Function Standards revision process in 2010, but that the final adoption of a fourth edition of the Standards was not expected to occur until at least 2013.) However, as of November 2014, the fourth edition has not yet been adopted. *See* CRIMINAL JUSTICE STANDARDS, *supra* note 140,

145. Little, *supra* note 97, at 1118.

146. Yaroshefsky, *supra* note 26, at 1327.

147. *See id.* at 1325 ("Federal and state court rules and statutes supplement prosecutors' constitutional obligations.").

Procedure govern all criminal proceedings in federal court.[148] Most relevant to this Note's discussion of how admissibility informs materiality is Rule 16 ("Discovery and Inspection"). Rule 16 requires the prosecutor to disclose upon the defendant's request information material to preparing the defense.[149] Such information may include the defendant's statement, his prior criminal record, tangible objects, reports of examinations and tests, and an expert witness's forthcoming testimony.[150]

Unlike the *Brady* rule, Rule 16 does not require disclosure of information "material to punishment."[151] Therefore, although the Federal Rules of Criminal Procedure might be considered an attempted codification of the *Brady* rule,[152] Rule 16 does not fully address the prosecutor's disclosure duty.[153] Because the prosecution "control[s] the flow of information to the defendant,"[154] this limited disclosure scope imposes a challenge on the defendant's preparation.

The American College of Trial Lawyers has, in response, proposed amending Rule 16 to "ensure that defendants receive the full and consistently applied benefit" of the *Brady* rule and to "promote greater fairness and integrity in criminal discovery generally."[155] Amendments would define "favorable information," require the prosecution to respond to disclosure requests in writing within fourteen days, and impose a due diligence obligation on the prosecution to consult with government agents for disclosable information.[156] Such revisions are intended to ensure a more fair trial by clearly defining how the prosecutor can identify exculpatory information warranting disclosure.[157]

In addition to constitutional standards, codes of professional conduct and federal rules, the prosecutor's disclosure duty is informed by guidelines drafted by the prosecutor's office.[158] The U.S. Attorneys' Manual is

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148. FED. R. CRIM. P. 1(a)(1) ("These rules govern the procedure in all criminal proceedings in the United States district courts, the United States courts of appeals, and the Supreme Court of the United States.").

149. *See id.* 16.

150. *See id.*; *see also* The Jencks Act, 18 U.S.C. § 3500 (2013) (further providing that a prosecutor may be compelled to produce a verbatim statement of a government witness after the witness has testified).

151. *See* United States v. Armstrong, 517 U.S. 456, 461–64 (1996); Yaroshefsky, *supra* note 26, at 1325 n.16.

152. *See* Gershman, *supra* note 50, at 725 ("Codifying *Brady*").

153. *See* Am. Coll. of Trial Lawyers, *supra* note 118, at 94 ("Four decades later [after *Brady v. Maryland*], Federal Rules of Criminal Procedure 11 and 16, which govern federal plea negotiations and criminal discovery, respectively, still do not address this duty, let alone require the government to timely disclose to the defendant favorable information that is material to either guilt or sentencing.").

154. *Id.* at 102.

155. *Id.* at 95.

156. *Id.*

157. *See id.* at 101.

158. *See* Gershman, *supra* note 50, at 686–87 (noting that "prosecutors' offices have formulated guidelines to foster compliance with the requirements of *Brady*").

drafted by DOJ to serve as a "quick and ready"[159] (yet "comprehensive"[160]) reference for federal prosecutors. Section 9-5.001 addresses the USAO policy on disclosure of exculpatory and impeachment information in a criminal trial or court proceeding.[161]

Most relevant to the circuit court split at issue in this Note is the Manual's discussion of "Materiality and Admissibility."[162] The USAO recognizes that "it is sometimes difficult to assess" evidence for disclosure-warranting materiality.[163] In response, the USAO highlights its policy of encouraging prosecutors to "err on the side of disclosure if admissibility is a close question."[164] The federal prosecutor's office therefore promotes a view of materiality that is more broad than that required by the Court.[165]

C. Exacerbating the Conflict: Wood v. Bartholomew

In 1995, the Supreme Court was faced with an issue that *Brady* and its progeny had not addressed: whether inadmissible evidence is per se immaterial for *Brady* purposes.[166] In *Wood v. Bartholomew*, the Court found that an inadmissible polygraph result was immaterial for *Brady* purposes.[167] The Court did not, however, explain whether inadmissibility was determinative of, or simply a factor of, materiality.[168] The circuit courts have subsequently produced three different interpretations of *Wood*, resulting in the current conflict over whether inadmissible evidence may, nonetheless, be material.[169]

On August 1, 1981, Dwayne Bartholomew killed a laundromat attendant by shooting him in the head during a robbery.[170] Because Bartholomew admitted that he committed the robbery and that the shots came from his gun,[171] the issue at trial was only whether Bartholomew was guilty of aggravated first-degree murder requiring proof of premeditation or first-degree murder not requiring premeditation.[172]

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159. U.S. ATTORNEYS' MANUAL, *supra* note 6, § 1-1.100 (2009) .
160. *Id.* § 1-1.200.
161. *See id.*
162. *Id.* § 9-5.001(B)(1).
163. *Id.*
164. *Id.* § 9-5.001(E).
165. *See id.* § 9-5.001(B)(1). That the USAO encourages prosecutors to err on the side of disclosure begs the question of why the conflict at issue in this Note exists. Perhaps the answer can be found by noticing the USAO's potentially overlapping—if not actually conflicting—messages: whereas the Manual promotes a broad view of materiality as it relates to admissibility, the Ogden Memo encouraged prosecutors to follow the local disclosure practice.
166. *See* Wood v. Bartholomew, 516 U.S. 1, 8 (1995).
167. *See id.*
168. *See id.*
169. *See infra* Part II.
170. *Wood*, 516 U.S. at 2.
171. *See id.*
172. *See id.* at 3.

The defendant and witnesses alleged contrasting versions of the facts. Bartholomew's brother and the brother's girlfriend testified that Bartholomew told them he planned to rob the laundromat and to "leave no witnesses."[173] The defendant denied saying this and instead testified that his gun discharged by accident—once into the attendant's head and a second time into the nearby counter.[174] The defendant further contended that his brother had in fact assisted in the robbery by convincing the attendant to open the already locked laundromat doors.[175]

Before trial, the brother took a polygraph test in which he was asked if he and Bartholomew were in the laundromat together during the robbery and if he had assisted Bartholomew in the robbery.[176] The brother responded in the negative to both questions, but the polygraph examiner concluded that his responses indicated deception.[177] Neither the brother's polygraph examination results nor those of his girlfriend were disclosed to Bartholomew.[178]

Bartholomew filed a habeas petition in the Western District of Washington arguing that the prosecution's failure to produce the polygraph examinations constituted a *Brady* violation.[179] The district court denied the writ, holding that Bartholomew failed to "show that *evidence* was withheld" because he "fail[ed] to show that disclosure of the results of the polygraph to defense counsel would have had a reasonable likelihood of affecting the verdict."[180]

The Ninth Circuit reversed the district court's denial of habeas relief, instead holding that the polygraph information was material under *Brady* despite being inadmissible at trial under Washington law.[181] The Ninth Circuit rejected the lower court's assumption that "the polygraph results would have been material if they had been admissible."[182] Instead, the Ninth Circuit reasoned that although the polygraph results were inadmissible, their disclosure could have prompted the defense counsel to investigate the brother's story and to depose him, which might have "uncovered a variety of conflicting statements which could have been used quite effectively in cross-examination at trial [of the brother]."[183]

The Supreme Court granted Bartholomew's petition for a writ of certiorari and reversed the Ninth Circuit's judgment, instead finding the polygraph results immaterial.[184] The Court emphasized its previous

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173. *Id.*
174. *See id.*
175. *See id.* at 3–4.
176. *See id.* at 4.
177. *See id.*
178. *See id.*
179. *See id.* at 4–5.
180. *Id.* at 5.
181. *See* Bartholomew v. Wood, 34 F.3d 870, 876 n.6 (9th Cir. 1994).
182. *Id.* at 875.
183. *Id.* at 875–76.
184. *See Wood*, 516 U.S. at 9.

holdings in *Kyles* and *Bagley* that evidence is material under *Brady* only when there is a reasonable probability that its disclosure would have led to a different outcome at trial.[185] Here, the polygraph results were not reasonably likely to alter the trial result because they were inadmissible under state law.[186]

Significant to this Note's focus on admissibility and materiality is the Court's discussion in dicta of the Ninth Circuit's finding. The Court rejected the proposition that the polygraph results were material because their disclosure could have instigated a defense trial strategy change, which could have led to admissible evidence.[187] That reasoning was criticized as too tenuous and speculative for having ignored that the defense counsel had not actually planned to depose the brother.[188]

Although the Court noted that this logic was too speculative on the facts,[189] it did not decide whether inadmissible evidence may be material if its disclosure could eventually lead to admissible evidence.[190] The circuit courts have interpreted this fact-specific aspect of the *Wood* opinion differently, precipitating the current split of authority on whether inadmissible evidence can nonetheless be material.[191]

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185. *See id.* at 5–6; *see also supra* notes 89–96 and accompanying text.

186. *See Wood*, 516 U.S. at 6.

187. *See id.* at 5–6. The Court emphasized that the Ninth Circuit's reasoning could not be upheld in part because "the Court of Appeals did not specify what particular evidence it had in mind [and therefore] [i]ts judgment is based on mere speculation, in violation of the standards we have established." *Id.* It is unclear whether the Court would have found the Ninth Circuit's reasoning more acceptable had the circuit court specified the type of evidence it thought the polygraph results could have led defense counsel to beyond "a variety of conflicting statements which could have been used quite effectively in cross-examination at trial" to weaken the brother's testimony. *Wood*, 34 F.3d at 876. This mix of a clear holding with ambiguous asides in the reasoning is what makes the Court's holding in *Wood* fodder for the circuit courts' varying interpretations of whether inadmissible evidence can be material under *Brady*.

188. *See Wood*, 516 U.S. at 6–7.

189. *See id.* at 6, 8 (noting that "[the Ninth Circuit's] judgment is based on mere speculation" because, even if the polygraph results were admissible at trial under state law, and even if defense counsel could have been inspired to change strategy to depose the brother, the jury would still not likely think Bartholomew's gun went off twice by accident).

190. *See* Gregory S. Seador, Note, *A Search for the Truth or a Game of Strategy? The Circuit Split Over the Prosecution's Obligation to Disclose Inadmissible Exculpatory Information to the Accused*, 51 SYRACUSE L. REV. 139, 148 (2001) (noting that "the crux of the Court's holding was that the undisclosed polygraph results were not material because there was not a reasonable probability that, had they been disclosed, the trial result would have been different, because the evidence against Bartholomew was overwhelming. . . . [It thus] remains to be seen what the Court would do if it was [sic] squarely presented with the issue").

191. *See id.* (positing that because the Court could have resolved *Wood* differently "[w]ith slightly varied facts," the issue of whether inadmissible evidence can be material remains open to interpretation by the circuit courts).

II. THE CONFLICT: CAN INADMISSIBLE EVIDENCE BE MATERIAL?

Part II of this Note discusses the circuit split regarding whether evidence inadmissible at trial may nonetheless be material under *Brady*. The split is comprised of three primary understandings of when the prosecutor must disclose inadmissible exculpatory information. Part II.A discusses the courts interpreting *Wood v. Bartholomew* to create a rule that inadmissible evidence is per se immaterial.[192] These "per se courts" consider admissibility determinative of materiality. Part II.B then addresses the courts holding that inadmissible evidence may be material if its disclosure could yield admissible evidence.[193] These "factor courts" consider admissibility a factor of materiality.[194] Part II.B.1 outlines which of these courts require a direct link between the inadmissible and admissible evidence, while Part II.B.2 discusses the courts holding that the link must be based on more than "mere speculation."[195] Part II.C discusses the "*Bagley* courts"—those that do not consider admissibility a factor of materiality and instead interpret *Wood* as applying the *Bagley* and *Kyles* "reasonable probability of an altered trial outcome" materiality test.[196]

A. "Per Se Courts": Admissibility Is Determinative of Materiality

The First and Fourth circuits interpret *Wood* as creating a per se rule that inadmissible evidence is immaterial for *Brady* purposes.[197] These per se courts hold that the prosecution's failure to disclose exculpatory evidence that would be inadmissible at trial does not constitute a violation of the defendant's due process rights.[198] Reasoning that information cannot create a reasonable probability of an altered trial outcome[199] if it cannot be introduced as evidence, these courts find admissibility determinative of materiality.

In *United States v. Rosario-Diaz*,[200] the First Circuit affirmed the lower court's holding that there was no *Brady* violation where the prosecution failed to disclose a policeman's statement about a witness's testimony.[201] There, the codefendants were convicted of murdering a young woman after

192. *See infra* Part II.A.
193. *See infra* Part II.B.
194. *See infra* Part II.B.
195. United States v. Persico, 164 F.3d 796, 805 (2d Cir. 1999); *see also infra* Part II.B.
196. *See infra* Part II.C.
197. *See infra* notes 200–19 and accompanying text. *But see* Ellsworth v. Warden, 333 F.3d 1, 9 (1st Cir. 2003) (Lipez, J., concurring) (noting that although a written note was inadmissible evidence as "double hearsay," it may nonetheless be material if its disclosure could lead to admissible evidence). The *Ellsworth* court noted, "we think it plain that evidence itself inadmissible *could* be so promising a lead to strong exculpatory evidence that there could be no justification for withholding it. *Wood v. Bartholomew* . . . implicitly assumes this is so." *Id.* at 5 (citation omitted) (en banc) (majority opinion).
198. *See infra* notes 200–19 and accompanying text.
199. *See supra* notes 89–96 and accompanying text.
200. 202 F.3d 54 (1st Cir. 2000).
201. *See id.* at 66–67.

carjacking her and demanding drug money that they thought she was holding as a fellow drug trafficker.[202] The day after the verdict was rendered, the victim's father gave an interview saying that the policeman told him during the trial that his daughter was not involved with the drug money.[203]

The defendants contended that the policeman's statement was based on undisclosed evidence[204] and moved for a new trial on the basis of newly discovered evidence.[205] The district court, however, deemed the policeman's statement a "mere layman's opinion as to the victim's connection with drugs."[206] The district court cited the First Circuit's reasoning in pre-*Wood United States v. Ranney*,[207] which held that "[i]nadmissible evidence is by definition not material [under *Brady*], because it never would have reached the jury and therefore could not have affected the trial outcome."[208] The *Rosario-Diaz* court relied on *Wood* for the proposition that "[l]ack of disclosure of evidence that is not admissible at trial is deemed not 'material' under *Brady*; hence failure to disclose it will not be considered a *Brady* violation."[209] The court applied this to find that the policeman's statement was inherently immaterial under *Brady* because "[o]pinion testimony on the veracity of the testimony of another witness is not admissible"[210] at trial under Federal Rule of Evidence 701.[211]

The Fourth Circuit similarly interprets *Wood* as holding that inadmissible evidence is inherently immaterial. In *Hoke v. Netherland*,[212] the Fourth Circuit reversed the defendant's granted habeas petition and reinstated a death sentence for the rape and murder of a woman in her home.[213] The defendant argued that his due process rights were violated where the prosecution did not disclose police interviews with three men who stated they had each in the past had consensual sex with the victim.[214] The district court permitted the defendant to claim a *Brady* violation on the basis that

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202. *See* United States v. Montalvo, 20 F. Supp. 2d 270, 272 (D.P.R. 1998).

203. *See id.* at 276 ("[T]he investigator . . . told me 'Don Samuel your daughter didn't have anything to do with this, she's innocent.'").

204. *See id.* at 271.

205. *See id.*; *see also* FED. R. CRIM. P. 33(b)(1).

206. *Montalvo*, 20 F. Supp. at 272.

207. 719 F.2d 1183 (1st Cir. 1983).

208. *Id.* at 1190 (finding that a witness's grand jury statement was immaterial because it was "inadmissible hearsay because he was merely relating what another salesman had told him about [the defendant]").

209. *Montalvo*, 20 F. Supp. 2d at 277.

210. *Id.*

211. *See* FED. R. EVID. 701 ("If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.").

212. 92 F.3d 1350 (4th Cir. 1996).

213. *See id.* at 1352, 1365.

214. *See id.* at 1354.

these statements were potentially exculpatory and thus invalidated the predicate rape charge.[215]

The Fourth Circuit, however, reversed and reinstated the defendant's convictions of rape and capital murder.[216] The court relied on *Wood* for the proposition that inadmissible evidence can never create a reasonable probability that the trial outcome would be altered.[217] Stressing that because withheld statements "may well have been inadmissible at trial under Virginia's Rape Shield Statute," the statements were "as a matter of law, 'immaterial' for *Brady* purposes,"[218] the court found no *Brady* violation.[219]

B. "Factor Courts": Admissibility Is a Factor of Materiality

Several courts of appeal interpret *Wood* to hold that inadmissible evidence may be material for *Brady* purposes if its disclosure could yield admissible evidence. These courts—the Second, Third, Eighth, Ninth, and Eleventh Circuits—consider admissibility a factor but, not dispositive, of materiality. Within this interpretation are two methods of analysis. One group of courts holds that to be material, the inadmissible evidence's disclosure must lead directly to admissible evidence.[220] A second group finds that there must be a link between the inadmissible and admissible evidence that is based on more than mere speculation.[221]

1. A Direct Lead to Admissible Evidence

The Third, Ninth, and Eleventh Circuits have held that inadmissible evidence is nonetheless material to a defendant's due process rights if its disclosure would lead directly to admissible evidence.[222]

The Ninth Circuit has interpreted *Wood* to mean that failure to disclose inadmissible evidence can be a *Brady* violation if that evidence's disclosure would have led directly to admissible evidence.[223] In *Coleman v. Calderon*,[224] the Ninth Circuit found no *Brady* violation where the prosecution had failed to disclose information about other murder suspects.[225] The defendant was convicted of raping and strangling a woman to death on a high school football field.[226] The police investigated

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215. *See id.*
216. *See id.* at 1352.
217. *See id.* at 1356 n.3.
218. *Id.*
219. *See id.* at 1358.
220. *See infra* Part II.B.1.
221. *See infra* Part II.B.2.
222. *See infra* notes 224–53 and accompanying text.
223. Coleman v. Calderon, 150 F.3d 1105 (9th Cir. 1998), *rev'd in part*, 525 U.S. 141 (1998).
224. *Id.*
225. *See id.* at 1117.
226. *See id.* at 1108.

and eliminated four other suspects: the woman's boyfriend; a man with a felony record who had been harassing her; the woman's violent ex-boyfriend who had been following her; and a man who had committed a rape and kidnapping near the high school.[227] The police eliminated these suspects because their fingerprints did not match those at the crime scene, but the police did not test the suspects' blood or hair against crime scene samples.[228]

At trial, the prosecution did not dispute that the police's failure to test the suspects' DNA against crime scene samples was both favorable and not disclosed to the defendant.[229] The Ninth Circuit, therefore, considered only if the information was "material" such that nondisclosure had violated the defendant's due process rights under *Brady*.[230]

The Ninth Circuit found there was no *Brady* violation because "[t]o be material, evidence must be admissible or must lead to admissible evidence."[231] Reasoning that the information about the other suspects was immaterial because it was inadmissible at trial[232] and there was no reason to believe disclosure would have led to the discovery of admissible evidence,[233] the court found no due process violation.[234]

The Eleventh Circuit similarly ruled that inadmissible evidence may be material under *Brady* if its disclosure could lead to admissible evidence. In *Wright v. Hopper*,[235] the court found no *Brady* violation where the prosecution failed to disclose a detective's inadmissible affidavit.[236] The defendant had been sentenced to death in the Southern District of Alabama for robbery and murder when he and others burglarized a couple's auto store and shot them in the head.[237] The defendant argued that his due process rights were violated when the prosecution failed to disclose a

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227. *See id.* at 1116.
228. *See id.*
229. *See id.*
230. *Id.*
231. *Id.* at 1116–17.
232. *See id.* at 1117 ("In order for evidence of another suspect to be admissible, there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime. Motive or opportunity is not enough." (citation omitted)).
233. *See id.* The court did not articulate the necessary link between inadmissible and admissible evidence, but rather stated that:

> Coleman argues that had he been given this information he could have conducted a timely investigation which might have uncovered witnesses who saw these other suspects bothering [the victim] or being violent towards her. What is missing in Coleman's argument is any evidence linking any of these other suspects to the crime, or any showing that disclosure of their existence would have led to the discovery of admissible evidence. This missing link compels the conclusion that the information about the other suspects was not material. There was no *Brady* violation.

Id.
234. *See id.* at 1116–17.
235. 169 F.3d 695 (11th Cir. 1999).
236. *See id.* at 702.
237. *See id.* at 698–99.

detective's affidavit declaring that a woman said her boyfriend—a man other than the defendant—owned the gun used in the murders.[238]

The Eleventh Circuit, however, rejected the defendant's argument and instead relied on the rule that "[i]nadmissible evidence may be material if the evidence would have led to admissible evidence."[239] The detective's affidavit was immaterial because it was inadmissible at trial as hearsay, and the defendant failed to demonstrate that its disclosure would have led to admissible evidence.[240]

The *Wright* court echoed the Ninth Circuit's requirement that the defendant demonstrate some sort of link between the inadmissible evidence and potential admissible evidence for the information to be "material" under *Brady*.[241] As in *Coleman*, however, the *Wright* court stopped short of actually articulating what would suffice as such a link.[242]

The Third Circuit has also held that inadmissible evidence may be material for *Brady* purposes if its disclosure would lead to admissible evidence.[243] Roderick Johnson was convicted of first-degree murder and sentenced to life imprisonment without parole for shooting a man to death on the side of the road.[244] At trial, the prosecution offered no physical evidence or eyewitness statement.[245] Instead, the prosecution relied entirely on a witness's testimony that Johnson had confessed his guilt to him.[246] During discovery for his federal habeas claim (ten years after his state court conviction), Johnson discovered that the testifying witness was

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238. *See id.* at 701.

239. *Id.* at 703.

240. *See id.*

241. *Compare id.* ("Wright has failed to show that the affidavit would have led to admissible evidence . . . ."), *with* Coleman v. Calderon, 150 F.3d 1105, 1117 (9th Cir. 1998) ("What is missing in Coleman's argument is any evidence linking any of these other suspects to the crime, or any showing that disclosure of their existence would have led to the discovery of admissible evidence.").

242. *See Wright*, 169 F.3d at 703 ("Wright has failed to show that the affidavit would have led to admissible evidence because he did not call Roberts's girlfriend as a witness at the federal evidentiary hearing. Therefore, it is unknown exactly what she would say, and accordingly, Wright has failed to prove that what she would say is material. A court cannot speculate as to what evidence the defense might have found if the information had been disclosed."). Perhaps the *Wright* court felt that pointing out the lack of a link to admissible evidence, rather than identifying what would be an acceptable demonstration of a link to potential admissible evidence, was sufficient because the *Wood* holding was itself so ambiguous. *See id.* at 703 n.1 ("In reversing, the [*Wood*] Court did not declare that admissibility was a precondition to materiality. The Court proceeded to sift through the record and, after examining the possible effects that the undisclosed polygraph results would have had on the outcome of the trial, concluded that the information was not material. . . . Thus, the Court did not hold that admissibility of undisclosed evidence is a prerequisite to materiality. Accordingly, *Wood* does not conflict with our decision [that inadmissible evidence may be material if the evidence would have led to admissible evidence].").

243. Johnson v. Folino, 705 F.3d 117 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 61 (2013).

244. *See id.* at 125.

245. *See id.* at 120.

246. *See id.*

himself under investigation for several armed crimes and cooperating with the police as an informant.[247]

Johnson claimed that the prosecution's suppression of the witness's background as a criminal and informant failed to meet the disclosure duty under *Brady* and constituted a violation of his due process rights.[248] The Third Circuit reasoned that "the materiality standard . . . is not reducible to a simple determination of admissibility."[249] Admissibility is a "consideration"[250] but not dispositive of materiality.[251] The court held that inadmissible evidence may be material if it could lead to the discovery of admissible evidence or if it could be used to "impeach or corral" a witness at trial.[252] The Third Circuit remanded to the district court to determine whether information on the witness's background as a criminal and informant would have led to admissible evidence that could reasonably have altered the trial outcome.[253]

2. A Link to Admissible Evidence Supported by More Than Speculation

The Second and Eighth Circuits also hold that inadmissible evidence may be material if its disclosure would lead to admissible evidence. These circuits, however, impose a different standard than the Ninth and Eleventh Circuits. Whereas the Ninth and Eleventh Circuits require that the inadmissible evidence lead directly to admissible evidence to be material,[254] the Second and Eighth Circuits demand that the connection between the inadmissible and admissible evidence be based on more than "mere speculation."[255]

Michael Madsen was convicted of raping a woman in Missouri whom he found walking on the side of the road.[256] While in Madsen's house, the victim wiped her bloodied hand on a bathroom towel that was later taken into police custody.[257] The state's forensic chemist performed a serology test on the towel and concluded that the blood type was different from the

247. *See id.* at 120, 122.
248. *See id.* at 120.
249. *Id.* at 129.
250. *Id.*
251. *See id.* at 130 ("Even if we were to accept the proposition that suppressed evidence must be admissible in order to be material under *Brady*—which we do not—we could not endorse the District Court's application of such a principle here.").
252. *Id.* at 129–30; *see also* James L. Kainen, *Truth, Deterrence and the Impeachment Exception*, 86 OR. L. REV. 1017 (2007) (discussing the use of illegally-obtained evidence to impeach defendants but not defense witnesses); Steven Lubet, *Understanding Impeachment*, 15 AM. J. TRIAL ADVOC. 483 (1992) (discussing the purpose, successful application, and results of witness impeachment).
253. *See Johnson*, 705 F.3d at 133.
254. *See supra* Part II.B.1.
255. Madsen v. Dormire, 137 F.3d 602, 604 (8th Cir. 1998) ("[T]he district court's attempt '[t]o get around this problem' is 'based on mere speculation.'"); *see also* Seador, *supra* note 190, at 151.
256. *See Madsen*, 137 F.3d at 603.
257. *See id.*

victim's.[258] The forensic chemist noted this in her report, which the state provided to Madsen before trial.[259] At trial, the state declined to call the forensic chemist as a witness, saying that she was unreliable.[260] When Madsen's counsel attempted to introduce the serology report to impeach the victim's testimony, the prosecution objected and successfully argued that the report was unreliable because the forensic chemist had in the past failed blood typing proficiency tests.[261]

Madsen complained in his habeas corpus petition that the state violated his due process rights by failing to disclose before trial that the forensic chemist was actually incompetent to testify.[262] The district court agreed that the state violated its disclosure duty under *Brady*, reasoning that the nondisclosure precluded Madsen from the opportunity to impeach the forensic chemist by procuring his own expert.[263]

The Eight Circuit reversed and held that there was no *Brady* violation.[264] The court cited *Wood* for its criticism of the Ninth Circuit's attempt to "get around this problem" of admissibility by reasoning that the disclosure of polygraph results might have led defense counsel to conduct additional discovery, which might have led to admissible evidence.[265] The Eighth Circuit likewise would require more than "mere speculation" that the forensic chemist's competency was material simply because its disclosure could have led to admissible evidence.[266]

The *Madsen* court found the district court's materiality analysis was "based on mere speculation" because

> there [was] nothing in th[e] record which support[ed] the [district] court's apparent assumption underlying its materiality finding that had the seized items been tested by a competent chemist, the results would have been the same as [the state's forensic chemist's]—that is, the blood on the items would not be the same type as that of the victim's blood.[267]

The Eighth Circuit interpreted *Wood* as holding that inadmissible evidence may be material for *Brady* purposes if its disclosure could lead to admissible evidence—an analysis requiring more than "mere speculation."[268]

The Second Circuit applies a similar materiality analysis by asking if there is a credible reason to believe disclosure of the inadmissible evidence

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258. *See id.*
259. *See id.*
260. *See id.*
261. *See id.*
262. *See id.* at 604.
263. *See id.*
264. *See id.*
265. *Id.* (citing Wood v. Bartholomew, 516 U.S. 1, 6 (1995)); *see also supra* Part I.C.
266. *Madsen*, 137 F.3d at 604.
267. *Id.*
268. *Id.* at 605.

would lead to admissible evidence.[269] In *United States v. Persico*,[270] the Second Circuit held that the government's failure to disclose that its witness was also an informant was not a *Brady* violation because the information was immaterial.[271]

Robert Zambardi and Carmine Persico, Jr.—participants in a street war between factions of a New York City organized crime family—were indicted together on racketeering charges.[272] At the start of Persico's jury trial, in which he was convicted, Zambardi accepted a guilty plea.[273] At Persico's trial, the government relied heavily on the testimony of cooperating accomplice witnesses.[274] After the trial, the government made the "disquieting disclosure[]" that its witness was a long-term FBI informant who had lied about his involvement in the interfamily violence.[275]

Following this disclosure, Zambardi moved to withdraw his guilty plea.[276] Arguing that he would not have accepted the deal had the prosecution revealed this information, Zambardi complained that its nondisclosure constituted a violation of his due process rights under *Brady*.[277] Had he gone to trial, Zambardi reasoned, he could have used this information to impeach the witness.[278]

The district court rejected Zambardi's motion, finding the newly disclosed evidence was not material.[279] The Second Circuit affirmed, criticizing Zambardi's argument as one that "rests on a sequence of hypothetical events all of which are highly speculative and most unlikely to have occurred."[280] The court required a less tenuous link to admissible

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269. *See* Seador, *supra* note 190, at 151.
270. 164 F.3d 796 (2d Cir. 1999).
271. *See id.* at 805.
272. *See id.* at 798.
273. *See id.* at 798, 800.
274. *See id.* at 799.
275. *Id.*
276. *See id.* at 800.
277. *See id.* at 800, 805.
278. *See id.* at 805 ("[Zambardi] predicts that if he had gone to trial, the . . . information would have been admitted into evidence, that evidence would have significantly reduced the chances of his conviction, and, if the information had been disclosed before his plea, he would have had sufficient confidence in the admissibility of the information and its likely effect on the jury to go to trial and risk exposure to a life sentence instead of the 15 years specified in his plea bargain.").
279. *See id.* The court applied "the standard for granting a motion to withdraw a guilty plea, after conviction but before sentencing, on the ground of newly discovered *Brady*/*Giglio* material." *Id.* at 798. This is an abuse of discretion standard whereby the Second Circuit examines whether the district court "exceeded its discretion under Fed. R. Crim. P. 32(e) by not allowing him to withdraw his guilty plea . . . for any fair and just reason." *Id.* at 804. This procedural inquiry is the platform from which the Second Circuit launches its discussion of the materiality standard for a *Brady* violation.
280. *Id.* at 805.

exculpatory evidence that could alter the trial outcome.[281] The information was immaterial because it was inadmissible as impeachment evidence and could only speculatively lead to admissible evidence.[282]

C. "Bagley *Courts": Admissibility Is Not a Factor of Materiality*

Aside from the courts that find admissibility dispositive of materiality[283] and those that consider admissibility a factor of materiality,[284] some courts of appeal do not consider admissibility a factor of materiality. The Fifth and Seventh Circuits do not interpret the dicta in *Wood* and instead apply the *Bagley* and *Kyles* materiality standard to ask if evidence's disclosure would create a reasonable probability of a different trial outcome, regardless of its admissibility.[285]

The Seventh Circuit held that evidence is admissible if its disclosure would create a reasonable probability of a different trial outcome.[286] In *United States v. Silva*,[287] the court found that an informant's identity and criminal background was immaterial where its disclosure would not have been likely to undermine confidence in the jury verdict.[288] Pedro Silva was indicted in the Northern District of Illinois for various drug offenses.[289] Prior to trial, Silva moved for the government to share information about its confidential informant—a man Silva had met with while perpetrating the crime.[290] The motion was granted, and the prosecution disclosed the informant's identity, background information, and signed statement.[291] A

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281. *See id.* ("Even if admissible, it is highly doubtful that the information would have lessened the likelihood of Zambardi's conviction in light of the substantial evidence against him.").

282. *See id.* ("As to possible admissibility, the District Court properly analyzed the evidence as it related to Zambardi's case, and found that the impeachment evidence was not material. . . . If the evidence would not have been admissible, it obviously would not have had any influence on the jury.").

283. *See supra* Part II.A.

284. *See supra* Part II.B.

285. *See supra* notes 89–96 and accompanying text.

286. *See* United States v. Silva, 71 F.3d 667 (7th Cir. 1995); *see also* United States v. Martin, 248 F.3d 1161 (7th Cir. 2000) (affirming that information about misconduct by Drug Enforcement Agency officials who investigated the defendant and testified at trial was immaterial because there was no reasonable probability that the undisclosed evidence would have changed the outcome of trial); United States v. Asher, 178 F.3d 486, 496 (7th Cir. 1999) (holding that statements from a government witness about stolen Vehicle Identification Numbers were immaterial because "[t]he test for materiality under *Brady* is whether, in the absence of the evidence, the defendant received a fair trial resulting in a verdict worthy of confidence"); Lieberman v. Washington, 128 F.3d 1085 (7th Cir. 1997) (affirming that fingerprint evidence lifted from a rape scene was immaterial under *Brady* despite being admissible because there was no reasonable probability that the evidence's disclosure would have affected the trial outcome).

287. 71 F.3d 667 (7th Cir. 1995).

288. *See id.* at 671.

289. *See id.* at 668–69.

290. *See id.* at 669.

291. *See id.*

jury then convicted Silva of possession with intent to distribute cocaine.[292] After his conviction, Silva learned that a second man he had met with was also an informant working with the Drug Enforcement Agency and had an extensive criminal background.[293]

Silva argued that the government's failure to disclose the second informant's identity and background violated his right to due process.[294] The Seventh Circuit rejected this argument and affirmed Silva's conviction, holding that the information was immaterial and thus not subject to the prosecution's disclosure duty under *Brady*.[295]

Although the information may have been admissible for impeachment use under *Giglio*,[296] the court found the information nonetheless immaterial for Brady purposes because the informant's "credibility was not at issue in this trial, and thus evidence to impeach him would have been irrelevant and consequently inadmissible."[297] Moreover, there was no strong reason to believe that the informant's direct testimony would have supported Silva's entrapment defense.[298] It was, rather, merely an insufficiently "vague hope" that this information would alter the trial outcome.[299] The court also emphasized that the "unsavory nature of an informant is not admissible into evidence merely to make the prosecution appear dissolute by association."[300] The informant's identity and background was thus immaterial, although potentially admissible as impeachment evidence, because there was no "reasonable probability" that its disclosure would have supported Silva's entrapment defense to avert his conviction.[301]

The Fifth Circuit similarly holds that evidence is material under *Brady* if its disclosure would create a reasonable probability of a different trial outcome.[302] Sam Felder worked for a company providing services to a residential building for disabled tenants.[303] A Texas state court convicted Felder of capital murder for stabbing a quadriplegic tenant to death in his apartment with surgical scissors.[304] In the sentencing phase of trial, Felder's friend testified that Felder admitted the murder to her and recounted other crimes he had committed.[305] The prosecution did not disclose that the witness had previously been arrested for forgery.[306]

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292. *See id.*
293. *See id.* at 669–70.
294. *See id.* at 670.
295. *See id.* at 670–71.
296. *See supra* notes 75–77 and accompanying text.
297. *Silva*, 71 F.3d at 671 (citation omitted).
298. *See id.*
299. *Id.*
300. *Id.* at 670.
301. *Id.* at 671.
302. Felder v. Johnson, 180 F.3d 206 (5th Cir. 1999).
303. *See id.* at 209.
304. *See id.* at 208–09.
305. *See id.* at 209.
306. *See id.* at 211.

The Fifth Circuit reviewed Felder's denied petitions for habeas corpus.[307] Felder argued that the state's nondisclosure of its witness's arrest record violated his right to due process.[308] Had the information been disclosed, Felder complained, his attorney would have investigated the arrest and could have discovered admissible impeachment evidence on the witness's "reputation for dishonesty."[309]

The Fifth Circuit acknowledged that it had not sufficiently specified "how to deal with *Brady* claims about inadmissible evidence."[310] The court therefore asked "only the general question [of] whether the disclosure of the evidence would have created a reasonable probability that the result of the proceeding would have been different."[311] Applying this standard, the court deemed the information on the witness's history immaterial because its disclosure would not have created a reasonable probability of a different sentence for Felder.[312] Noting that "inadmissible evidence may be material under *Brady*,"[313] the Fifth Circuit nonetheless found this information immaterial because its disclosure was not likely to have avoided the capital sentence.[314]

III. RESOLVING THE CONFLICT: RESOLUTION FROM ABOVE, REFORM FROM WITHIN

Part III of this Note attempts to reconcile the circuit split over when inadmissible evidence is material by positing how the Supreme Court should rule on the conflict. This Note ultimately argues, however, that true resolution must come from the prosecutor's office itself.

This legal conflict has the potential to become a very real function of the American criminal defendant's experience.[315] The trial is lauded as "the gold standard of American justice."[316] The circuit courts' disparate definitions of "*Brady* material,"[317] however, have the potential to erode the truth-seeking foundations of our system. Given the DOJ's directive for

307. *See id.* at 208.
308. *See id.*
309. *Id.*
310. *Id.*
311. *Id.*
312. *See id.* at 213. Although the Fifth Circuit inquires whether the information's disclosure would have altered the defendant's "sentence," it nonetheless applies the standard as set forth in *Kyles v. Whitley*—that information is material if there is a "'reasonable probability' that had the evidence been disclosed the *result at trial* would have been different." *Id.* at 212 (emphasis added) (quoting Wood v. Bartholomew, 516 U.S. 1, 5 (1995)). The *Felder* court asks whether the information's disclosure would have changed the defendant's "sentence" only because, "[o]n appeal, this *Brady* claim is directed toward only the sentence of death, even though [the witness] testified during both the guilt and punishment phases" of the capital murder trial. *Id.* at 211.
313. *Id.* at 212 (quoting Spence v. Johnson, 80 F.3d 989, 1005 n.14 (5th Cir. 1996)).
314. *See id.* at 212–13.
315. *See* Bornstein et al., *supra* note 18 and accompanying text.
316. Lafler v. Cooper, 132 S. Ct. 1376, 1398 (2012).
317. *See supra* Part II.

prosecutors to follow local circuit court practice rather than to attempt a uniform discovery policy across jurisdictions,[318] the conflict requires a timely and effective resolution.

The Supreme Court should resolve the circuit split over materiality by allowing admissibility as a factor of materiality. Holding that materiality is a function of, although not predicated on, admissibility is in line with the prevailing reasoning and a reasonable interpretation of the Court's prior holding in *Wood* as well as a reflection of the *Brady* doctrine's underpinnings. Issues relating to *Brady* violations may frequently punctuate the public discourse,[319] and commentators have urged that the Supreme Court should decide the issue of when inadmissible evidence is nonetheless material.[320] The Supreme Court, however, continues to decline the invitation, even recently denying certiorari that could have resolved the circuit split.[321] Although a timely resolution of the problem is important given the issue's significant implications for defendants,[322] it is unlikely to come from the judiciary.

This Note ultimately argues for the practitioners and prosecutors themselves to address the conflict. Although this non-doctrinal approach would not resolve the split among the circuit courts as would a precedential Supreme Court ruling, it would help to ameliorate the issue's negative repercussions in practice. Part III.A outlines how the Supreme Court should resolve the circuit split over how admissibility informs materiality. Part III.B then concludes by arguing for alternative means of resolution that should be broached from inside the prosecutor's office.

A. Resolution from the Judiciary: The Supreme Court Should Hold That Admissibility Is a Factor of Materiality

The Supreme Court should resolve the conflict by ruling that inadmissible information may nonetheless be material for *Brady* purposes. Finding that admissibility is a factor of materiality would reflect both the prevailing circuit courts' logic and the most reasonable reading of the Court's own prior reasoning in *Wood*. Furthermore, this resolution would be a prudent reflection of the underpinning of the Court's holding in *Brady v. Maryland*.

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318. *See* Ogden, *supra* note 20 and accompanying text.

319. *See, e.g.*, Editorial, *Don't Ignore the* Brady *Rule: Evidence Must Be Shared*, L.A. TIMES (Dec. 29, 2013), http://articles.latimes.com/2013/dec/29/opinion/la-ed-brady-20131229.

320. *See, e.g.*, Abigail B. Scott, *No Secrets Allowed: A Prosecutor's Obligation to Disclose Inadmissible Evidence*, 61 CATH. U. L. REV. 867 (2012).

321. *See supra* note 243.

322. *See* Bornstein et al., *supra* note 18 and accompanying text.

1. The Prevailing Logic

The prevailing reasoning among the circuit courts is that inadmissible information can be material so long as its disclosure would yield admissible evidence.[323] This middle-of-the-road[324] concept of materiality is, nonetheless, nuanced with two interpretations of the extent to which the inadmissible evidence must lead to admissible evidence.[325] Whether inadmissible evidence must lead directly to admissible evidence or be linked to admissible evidence by more than speculation, each approach imposes a limit on what could be considered an otherwise endless causation link. Capping off the extent to which the court will follow a trail of hypothetical breadcrumbs to admissible evidence has the appealing effect of supporting judicial efficiency.

Accepting a direct or very strong link to admissible evidence as the standard for materiality is, furthermore, a reasonable interpretation of the Supreme Court's holding that evidence is material if its disclosure would create a reasonable probability of a different outcome at trial.[326] Introducing admissible evidence would clearly alter a trial's disposition, but inadmissible evidence could also affect the trial outcome if it could strongly inform the defendant's case. Holding that only admissible evidence could change a trial outcome would be too narrow of an understanding of the nuances that affect a trial. Holding that admissibility is a factor of materiality allows the defendant to make an argument for the information's potential impact, but requires a strong argument rooted in more than speculation. Ruling that inadmissible information may be material if its disclosure could yield admissible evidence is the most reasonable way to safeguard an important constitutional right while preventing the trial process from unraveling into an open-ended series of inefficiencies.

2. The Reasonable Reading of *Wood*

Ruling that inadmissible evidence may be material if its disclosure could yield admissible evidence reflects a reasonable reading of the Court's prior holding in *Wood v. Bartholomew*.[327] Although the Court found that inadmissible polygraph results were immaterial because such inadmissible information could not reasonably alter the trial outcome, it did not rule that inadmissible evidence is per se immaterial.[328]

The Court held that the evidence was immaterial because it was inadmissible, but also discussed in dicta that the defendant's argument (that the results were material because they could have led to admissible

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323. *See supra* Part II.B.
324. *Compare supra* Part II.A, *with* Part II.C.
325. *See supra* Part II.B.1–2.
326. *See supra* Part I.C.
327. *See supra* Part I.C.
328. *See* Wood v. Bartholomew, 516 U.S. 1, 8 (1995); *see also supra* Part I.C.

evidence) was too tenuous.[329] The Court did not hold that the defendant's reasoning was wrong, but rather simply rejected it as insufficiently supported in fact.[330] This is reflected in the prevailing circuit court approach that inadmissible evidence can be material if its disclosure either would lead directly to admissible evidence or is linked to admissible evidence through more than speculation.

3. Reflections of *Brady*'s Purpose

Holding that admissibility is a factor of materiality is the appropriate resolution because it would support the Court's reasoning in prior *Brady* rule jurisprudence. The *Brady* rule is not a discovery doctrine but rather an assertion of the defendant's due process rights.[331] As such, it calls for a conception of materiality that is broad enough to avoid constitutional violations but limited enough to avoid causing unnecessary inefficiencies. As a public servant, the prosecutor is charged with safeguarding the defendant's due process rights.[332]

Post-*Brady* jurisprudence expanded the *Brady* holding to reflect the prosecutor's duty to uphold constitutional rights.[333] The Court should resolve this conflict by finding admissibility a factor of materiality to give the prosecutor enough of a framework to reinforce her duty to safeguard due process rights but also enough leeway to pursue an adversarial trial.

B. Reform from Within the Prosecutor's Office

In 2012, the Supreme Court denied certiorari on the issue of how admissibility informs materiality.[334] As a result, this Note argues that the conflict must be addressed from within the prosecutor's office. As the architect of the proceedings,[335] the prosecutor has access to information and investigative resources often far outweighing that of the defendant. The prosecutor alone is responsible for reviewing information for disclosable *Brady* material.[336] As the advocate imbued with such extraordinary power, the prosecutor must maintain a critical eye on her own process and diligence.

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329. *See supra* notes 187–91 and accompanying text.
330. *See Wood*, 516 U.S. at 8.
331. *See* Curry v. United States, 658 A.2d 193 (D.C. Cir. 1995).
332. *See supra* notes 118–23 and accompanying text.
333. *See supra* Part I.A.3.
334. *See* Johnson v. Folino, 705 F.3d 117, 128 (3d Cir. 2012), *cert. denied*, 134 S. Ct. 61 (2013).
335. *See supra* note 122.
336. *See supra* note 112.

1. Open File Discovery: Eyes Wide Shut

Because the prosecutor serves as the check on her own discovery and disclosure practice,[337] commentators have proposed that prosecutors adopt an "open file" discovery policy.[338] Requiring the prosecution to automatically give defense counsel the entire investigation record may reduce the risk of *Brady* violations by essentially eliminating the prosecutor's role as the sole filter for disclosable material. Although an open file policy would give defense counsel the chance to review the information, it runs the risk of flooding public defender offices with tremendous amounts of information that may or may not be relevant to the materiality inquiry.[339] Open file discovery is therefore appealing as a way to avoid *Brady* violations by broadening the reach of disclosure but may have the unwanted effect of simply shuffling the review responsibility to the defense. This may, in turn, result in system inefficiencies and could diminish the prosecutor's unique role as both public servant and litigator.[340]

This inefficiency is further compounded by inefficacy. Applied to the criminal context, open file discovery fails not only to achieve its own purpose but also to solve the *Brady* problem. Specifically, open discovery may unblock the flow of information to the defendant but not necessarily from the defendant to the prosecution,[341] therefore failing to engender a reciprocal information exchange.[342] A reciprocal exchange is, furthermore,

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337. *See supra* note 112.

338. *See, e.g.*, Peter A. Joy, Brady *and Jailhouse Informants: Responding to Injustice*, 57 CASE W. RES. L. REV. 619, 641 (2007) (advocating for "open file" discovery to give defense attorneys greater access to potential *Brady* material); Brian Gregory, Note, Brady *Is The Problem: Wrongful Convictions and the Case for "Open File" Criminal Discovery*, 46 U.S.F. L. REV. 819, 822 (2012) (arguing that a "system of 'open file' discovery in criminal cases would go far to remedy the problems with respect to wrongful convictions that have manifested as a result of the modern interpretation of the *Brady* rule").

339. *See, e.g.*, Ira Mickenberg, *A Practical Guide to Brady Motions: Getting What You Want; Getting What You Need*, NEW FELONY DEFENDER TRAINING, CHAPEL HILL, N.C. (Mar. 14, 2008), http://www.ncids.org/Defender%20Training/2008%20New%20Felony%20Defender%20Training/BradyHandout.pdf ("The Problem of 'Open File' Discovery").

340. *See supra* Part I.B.2.

341. *See* United States v. Garsson, 291 F. 646, 649 n.6 (S.D.N.Y. 1923) ("While the prosecution is held rigidly to the charge, [the defendant] need not disclose the barest outline of his defense. He is immune from question or comment on his silence . . . ."); State v. Tune, 98 A.2d 881, 885 (N.J. 1953) ("[T]he state is completely at the mercy of the defendant who can produce surprise evidence at the trial . . . ."); *see also* H. Lee Sarokin & William E. Zuckerman, *Presumed Innocent? Restrictions on Criminal Discovery in Federal Court Belie This Presumption*, 43 RUTGERS L. REV. 1089, 1091 (1991) ("[A] criminal defendant's fifth amendment right against self-incrimination would limit disclosure by the defense even if the government's case were subject to open discovery, and the information would flow only one way.").

342. Some states are, however, legislating to create "broad, reciprocal discovery regimes" under which the criminal defendant can receive information from the prosecution if the defendant agrees to disclose useful trial information including witness lists or test results. Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CALIF. L. REV. 1585, 1622–23 & n.137 (2005); *see also* N.C. GEN. STAT. § 15A-902 (2004). That not all states are legislating for broad reciprocal discovery is,

not necessarily the remedy to a *Brady* complaint; the goal is for the prosecutor to share information with the defendant.[343]

The prosecutor's duty to disclose is sufficiently unclear that DOJ advises its prosecutors to simply "err on the side" of disclosure.[344] Yet, disclosure discrepancies and varied practices persist. Rather than, yet again, attempting to redefine the disclosure duty,[345] the conflict will most successfully be resolved by actually enforcing the prosecutor's policy of broad disclosure.[346] The merit of open file discovery is its recognition that enduring change must be affected from within the prosecutor's office. It is, nonetheless, a passive approach that would essentially skirt the issue.

2. The Case for a Permanent Task Force

An active and self-critical approach to reform is the implementation of a permanent prosecutorial task force. The USAO has in the past developed a "working group" of attorneys to examine *Brady* disclosure practices.[347] Indeed, this group's findings were reflected in the Ogden Memo.[348] The Ogden Memo, however, did more to shine a light on the issue of varying disclosure practices than it did to fix it.[349]

The prosecutor is already recognized as the player with the power to implement a system of self-checks to ensure disclosure integrity.[350] The DOJ Office of Professional Responsibility is charged with investigating allegations of misconduct related to the prosecutor's investigation and litigation of a case.[351] This review process is inherently retrospective; an allegation of misconduct must first occur to trigger the internal review.

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moreover, a further example of how the Ogden Memo's mandate for federal prosecutors to follow their local jurisdiction's disclosure practices does more to highlight than to fix the issue of disparate *Brady* practice. *See infra* note 349 and accompanying text.

343. *See* Daniel J. Capra, *Access to Exculpatory Evidence: Avoiding the* Agurs *Problems of Prosecutorial Discretion and Retrospective Review*, 53 FORDHAM L. REV. 391, 393 (1984) ("The crucial distinction between *Brady* and an open file rule is that *Brady* requires disclosure only of evidence favorable to the defendant.").

344. *See supra* notes 158–65 and accompanying text.

345. *See supra* Part I.B.3.

346. *See* Editorial, *supra* note 136 ("The Brady problem is in many ways structural. Prosecutors have the task of deciding when a piece of evidence would be helpful to the defense. But since it is their job to believe in the defendant's guilt, they have little incentive to turn over, say, a single piece of exculpatory evidence when they are sitting on what they see as a mountain of evidence proving guilt.").

347. *See* Ogden, *supra* note 20.

348. *See id.*

349. *See supra* note 18 and accompanying text. *But see Ensuring That Federal Prosecutors Meet Discovery Obligations: Hearing on S. 2197 Before the S. Comm. on the Judiciary*, 112th Cong. 1 (2012) (statement of James M. Cole, Deputy Att'y Gen., U.S. Dept. of Justice) (testifying that the DOJ disclosure misconduct in the prosecution of U.S. Senator Ted Stevens did "not suggest a systemic problem warranting a significant departure from longstanding criminal justice practices" because it was "an aberration").

350. *See supra* note 115.

351. *Office of Professional Responsibility*, DOJ, *available at* http://www.justice.gov/opr/ (last visited Nov. 26, 2014).

A permanent task force dedicated to managing disclosure practice would, by contrast, review disclosure practice as the investigation and litigation happens. A group of prosecutors in each office would vet its peers' disclosure determinations for potentially material exculpatory evidence. Rather than reviewing their colleagues' disclosure review process to meet the "local" practice,[352] which would simply perpetuate the conflict of disparate disclosure, the permanent task force would ensure its office's practice meets the expansive and inclusive disclosure policy espoused in the Ogden Memo.[353]

A successful task force of peers would set concrete standards for what suffices as a broad and diligent review for *Brady* material, which each prosecutor would be required to meet at set intervals for every case on her docket.[354] Although implementing a permanent task force would require substantial resources and is not likely to influence *Brady* violations until prosecutors commit to it as an administrative system, the proactive effort from within the prosecutor's office would likely be welcomed as a fresh response and affirmation of the U.S. Attorney's Office's role as justice seeker.[355]

3. Redrafting the System: The Architect's Design

A permanent task force may address the practical issue of disparate disclosure policies across prosecutor offices but would have little impact by way of resolving the discrete conflict at issue in this Note: whether inadmissible evidence is nonetheless material for *Brady* purposes. A second approach of affirmative self-reform from within the prosecutor's office is to support the drafting of a model statute proposing changed disclosure policies.

Commentators have argued for independent parties to intervene by setting "clearer rules and statutes by independent parties, as opposed to a working group made up of 'senior prosecutors.'"[356] Public interest groups and criminal defense attorneys have similarly proposed related model

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352. *See* Ogden, *supra* note 20. Local discovery practices are not only noncohesive as a whole but can often be incoherent as stand-alone practices. *See, e.g.*, Brian R. Gallini, *Help Wanted: Seeking One Good Appellate Brief That Forces the Arkansas Supreme Court to Clarify Its Criminal Discovery Jurisprudence*, 2009 ARK. L. NOTES 97, 98 (noting that "Arkansas has yet to conclusively provide an answer to [the] important question" of whether a prosecutorial nondisclosure violates the defendant's federal or state constitutional rights).

353. *See, e.g.*, Capra, *supra* note 343, at 397 ("[T]he flaw of *Brady* is in allowing the prosecutor to determine initially whether evidence should be turned over.").

354. *See, e.g.*, Barry Scheck, *Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models for Creating Them*, 31 CARDOZO L. REV. 2215 (2010) (proposing a model internal review process for district attorney's offices).

355. *See supra* Part I.B.2.

356. Ellen Podgor, *New DOJ Discovery Policies Fall Short*, WHITE COLLAR CRIME PROF. BLOG (Jan. 5, 2010), http://lawprofessors.typepad.com/whitecollarcrime_blog/2010/01/new-doj-discovery-policies.html.

rules.[357] In 2012, Senator Lisa Murkowski of Alaska proposed the Fairness in Disclosure of Evidence Act[358] in response to what DOJ found was reckless prosecutorial misconduct in the 2008 corruption trial of Senator Ted Stevens.[359] The proposed legislation posed to essentially moot the materiality factor of the prosecutor's exculpatory evidence disclosure obligation by imposing a uniform disclosure requirement of "all favorable information to the accused."[360] Attorney General James Cole contended, in response, that the proposed legislation's enactment would entail three negative consequences: (1) placing an administrative burden on prosecutors; (2) opening witnesses and victims to potential intimidation and harm; and (3) risking a threat to national security by potentially disclosing classified information.[361]

Reforms to the prosecutor's practice, however, should be rooted in the prosecutor's own insight. Rather than adding to the voluminous list of outside sources imposing a definition of the disclosure duty,[362] the prosecutor should herself instigate the drafting of a new standard that reflects the practical application of a broad disclosure practice.[363] Codifying the prosecutor's disclosure obligation in legislation drafted with prosecutors' direct input speaks to the DOJ's current interest in imposing standards to monitor its own conduct.[364]

CONCLUSION

The Supreme Court should resolve the current circuit split over whether inadmissible evidence is material for *Brady* purposes because the issue has immediate implications for the safeguarding of both due process rights and individual defendants' treatment. Although the *Brady* rule was intended to uphold constitutional rights, its application in practice has become alarmingly inexact. The Court's ambiguous opinion in *Wood v. Bartholomew* further obfuscated the issue of admissibility and materiality for the already splintering circuit courts. While the Court should rule that

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357. *See, e.g.*, NAT'L ASSOC. OF CRIM. DEF. LAWYERS, PROPOSED DISCOVERY REFORM LEGISLATION & COMMENTARY (May 20, 2011), http://www.nacdl.org/reports/discovery/; JUSTICE PROJECT, EXPANDED DISCOVERY IN CRIMINAL CASES: A POLICY REVIEW 21 (2007), http://www.prearesourcecenter.org/sites/default/files/library/expandeddiscoveryincriminalcasesapolicyreview.pdf.

358. Fairness in Disclosure of Evidence Act of 2012, S. 2197, 112th Cong.

359. *See* Charlie Savage, *Prosecutors Suspended in '08 Trial of a Senator*, N.Y. TIMES, May 25, 2012, at A22.

360. Fairness in Disclosure of Evidence Act of 2012 § 3014(b), S. 2197, 112th Cong.; *see also* Barry Berke & Eric Tirschwell, *An End to Cat-and-Mouse Discovery Games in Federal Criminal Cases?*, 248 N.Y.L.J., July 14, 2012.

361. *See* Peter A. Joy, *The Criminal Discovery Problem: Is Legislation a Solution?*, 52 WASHBURN L.J. 37, 41 (2012).

362. *See supra* Part I.B.3.

363. *See, e.g.*, NAT'L DIST. ATT'S ASS'N, NAT'L PROSECUTION STANDARDS § 1–1.2 (3d ed.) ("A prosecutor should seek to reform criminal laws whenever it is appropriate and necessary to do so.").

364. *See* Ogden, *supra* note 20.

inadmissible information is material if its disclosure could yield admissible evidence, yet another judicial opinion defining the prosecutor's duty to disclose may be unlikely to clarify the confusion. Because the prosecutor alone is imbued with the unique power to both safeguard justice and achieve rightful convictions, reform must instead come from within the prosecutor's office.